2002

Saundra Brower and Frank Oscar Brower v. Dr. David W. Brown and I. H. C. Hospitals, Inc. : Brief of Appellant

Utah Supreme Court

SUPREME COURT

STATE OF UTAH

SAUNDRA BROWER and
FRANK OSCAR BROWER,

PLAINTIFFS AND APPELLANTS,

vs.

DR. DAVID W. BROWN, and
I.H.C. HOSPITALS, INC., a corp.,
and I.H.C.HOSPITALS,INC.,a corp.,
doing business as VALLEY VIEW
MEDICAL CENTER,

DEFENDANTS AND RESPONDENTS.

CASE NO. 20553

APPEAL FROM JUDGMENTS AND ORDER OF THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY, STATE OF UTAH, CASE No. 10202, Honorable Allen B. Sorensen, District Judge Ret., JUDGE.

APPELLANTS' OPENING BRIEF

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TABLE OF CITATIONS AND AUTHORITIES

(note- "A"refers to text in addendum)

TABLE OF CITATIONS AND AUTHORITIES

(continued)

STATEMENT OF ISSUES

I.

The principal issue in this case is whether Appellants have commenced their action against the Respondents, who are Health Care Providers, within two years after the Appellant discovered or through the use of reasonable dilligence should have discovered the injury to Appellant Saundra Brower and proximately to the Appellant Oscar Brower, as provided in Utah Code Ann. sec. 78-14-4 (1978 & Supp.1979).

II.

Whether in fact there is a right to a separate trial on the Statute of Limitation issue pursuant to Utah Code Ann. Sec. 78-12-47.

III.

Whether there was active concealment of the negligence by the Respondents tolling the two year statute under Utah Code Ann. sec. 78-14-4.

IV.

Whether Appellants with no medical expertise are charged with knowledge of the negligence of the Health Care provider, in the absence of actual knowledge of such negligence.

V.

Whether the two year Statute of Limitations for medical malpractice commenced to run in July, 1981, when the Appellants were advised by a member of the healing arts

profession that there had been negligence on the part of Respondents in October, 1980.

VI.

Whether Appellants had any subjective understanding of the field of medicine.

VII.

Whether the injury was of such a catastrophic nature that Appellants should have been put on notice.

VIII.

Whether there was a possibility the injury might have been mistaken as an unavoidable consequence of the medical treatment.

IX.

Whether genuine issues of fact exist, precluding the granting of the Respondents' motions for summary judgment.

STATEMENT OF FACTS

This is an appeal from an order granting summary judgment in favor of Respondent I.H.C Hospitals, dba Valley View Medical Center, entered February 26, 1985, and from the summary judgment in favor of Respondent Dr. David W. Brown entered January 25, 1985, which are final judgments; and from the judgment denying Appellants' motions for summary judgment as to both Respondents entered March 11, 1985. The notice of appeal was filed March 25, 1985.

This is a medical malpractice case, alleging negligence on the part of the Respondent I.H.C. Hospitals dba Valley View Medical Center and Respondent Dr. David W. Brown, arrising out of a surgical hysterectomy performed on the Appellant Saundra Brower by Respondent Dr. David W.Brown on Otober 22, 1980, while hospitalized at the Valley View Medical Center in Cedar City, Utah. (Complaint ¶ 1 -20.) Appellant Saundra Brower sustained a puncture wound injury to her upper right thigh while in the recovery room of and under the care and control of Respondents, and while anesthetized or recovering therefrom. (Complaint ¶ 24-31.) Appellant Saundra Brower alleges that Respondent Dr. David W. Brown negligently performed the surgery, that he negligently treated her thereafter, and that as a result of the negligence of the said Respondents, that the Appellant Saundra Brower sustained the injuries alleged in her complaint on file. (¶ 1-23)

Appellants were not informed of the wrongful conduct of Respondents until July, 1981, when Appellant Saundra Brower was required to seek emergency treatment from another doctor. (Complaint 2-3)

Damages are prayed also for Appellant Oscar W. Brower, husband of Appellant Saundra Brower, for loss of consortium, and other general damages.

The ninety day statutory notice of intent was duly given to Respondents February, 16, 1983, pursuant to Utah Code Ann. sec 78-14-8, and the complaint was filed June 14, 1983. (Complaint .8) Appellants filed their own motion, which was denied, asking that the court rule that no issue existed as to the Statute of Limitation Section, Utah Code Ann. sec 78-12-47, (1953 as ammended) and that the Respondents be not entitled to a separate trial on said issue, as a matter of law. That motion was denied. (Motion for Partial Summary Judgment dated Sep. 17, 1984 , Judgment Denying Plaintiff Motion entered Mar. 11, 1985.)

Included in the record are the depositions of Respondent Dr. Brown, each of the Appellants, and Doyle T. Cantrell, Virginia E. Wyatt and Condra Lawrence, the latter three being employees of the Respondent I.H.C. Hospitals, Inc. Those depositions were ordered published. (See Order Publishing Depositions Jan. 1985.)

Appellant Saundra Brown, sustained an injury to her right thigh before recovering from anesthetic in the Valley

View Hospital in connection with surgery therein on or about Oct. 22, 1980, while under the exclusive care and control of the Respondents, Dr. Brown and I.H.C Hospitals. Also see Complaint of Appellants, 1-24)

The hysterectomy performed on Appellant Saundra Brower did not correct her problems. Respondent Dr. Brown, a couple of weeks after the hysterectomy, treated and prescribed for said Appellant, and told her that he could do nothing more for her. (Deposition of Saundra Brower, pages 60-61).

The Respondent Dr. Brown, prior to the operation, on or about Oct 14, 1980 advised Appellants that the pain she had been experiencing and the endometriosis would be gone as a result of the surgery, and that he "guaranteed" that Appellant Saundra Brower was going to feel better than she had in her whole life. (Deposition of Saundra Brower pages 41-42.) Appellant Saundra Brower as of the date of the hysterectomy was thirty nine years old, having been born Dec. 29, 1942. (Deposition of Saundra Brower page 5.) Said Appellant has described her problems as a result of the negligence complained of as a "living hell". (Deposition of Saundra Brower page 92.)

Appellant Saundra Brower in July of 1981 was required to obtain emergency hospital and medical treatment from a Dr. Bever and a Dr. Pandya in Kanab, Utah, for problems connected to the negligence of the Respondents, to wit the hysterectomy and injury sustained to Appellant's right thigh, at which

time she discovered the negligence of Respondents. (Deposition of Saundra Brower pages 66-69,93-95.) In addition, Appellant was required to undergo additional female surgery in 1983 by Dr. Johnson to remove additional endometriosis. (Deposition of Saundra Brower pages 92,93.)

As stated, Appellant, Saundra Brower discovered the negligence of Respondents in July of 1981 when she was forced to seek treatment from Dr. Pandya and go to the hospital in Kanab. She testified as follows:

> "...and they both told me at the time that if I wanted to go after him for malpractice, that they were behind me; that I had a suit against him." Deposition of Saundra Brower page 94 lines 6-8)

Further, Dr. Pandya and Dr, Bever told the Appellant at that time that what had happened was as a result "...of the treatment I had been given by Dr. Brown and the injection I had received..." (Deposition of Saundra Brower page 94 lines 2-4)

Appellant Saundra Brower testified as follows on page 95 of her deposition:

> "Dr. Bever, after checking me, called Dr. Pandya on the phone, and I was aware...and I could hear the conversation on Dr. Bever's part. And he said to Dr. Pandya what Dr. Brown did to me was criminal; that if he had gone out and killed someone or robbed a bank, he would go to jail for it, and what he did to me was far worse than what

any criminal in jail had done; that he had no right to have done it and get by with it." (Deposition of Saundra Brower page 95)

Dr. Pandya further stated that Appellant's vagina was like raw hamburger because she did not have the hormone nourishment needed in that area, that Appellant should not have had to go through the hot flashes and there is no need for anyone to go through what Appellant did when there was treatment available, that Appellant had needed estrogen which was not prescribed by Respondent Dr. Brown, who was fifteen years behind in his treatment. (Deposition of Saundra Brower, page 96.)

Appellant did not pursue the further treatment until July of 1981 when the hot flashes the tenderness became worse and she developed a blood clot in the area on her leg where the injection had been given in the hospital while she was under anesthetic. (Deposition of Saundra Brower, page 66 line 24-25, page 67 line 1-2.) Appellant Saundra Brower testified that between the latter part of 1980 and July of 1981 that she had persistant aching pain, and that when the blood clot developed in June or July of 1981 that "...it really got bad." She further testified that Dr. Pandya told her he felt it was a combination of the injection and the fact that the endometriosis had not cleared up and had cut off circulation to the leg. (Deposition of Saundra Brower pages 67-68.)

The charge Nurse, Condra Lawrence, who attended to the Appellant Saundra Brower while in the hospital in 1980, testified that she did discuss the matter of the "puncture wound" with Respondent Dr. Brown who said, "That would be OK," (Deposition of Condra Lawrence, page 12, lines 24-25 and page 13, lines 1-2.) She testified that Respondent Dr. Brown said it was OK to apply a hot pack. (Deposition of Condra Lawrence, page 13, lines 9-11.)

Appellant Saundra Brower testified that while in the hospital in October of 1980, she asked Dr. Brown, the Respondent, what happened to her leg. He replied, "I don't know, but I'll find out." Further, said Appellant said she "asked everybody", and one nurse said, "I'll find out." Dr. Brown, the Respondent, never did say anything about the leg to the Appellants again. (Deposition of Saundra Brower page 51, lines 12-13, page 52, lines 1, 8-15, page 53, line 16-21.)

The Notice of Intent of the Appellants pursuant to Utah code Ann. sec 78-14-18 was duly served Feb. 16, 1983, and the complaint herein was duly filed June 14,1984. (See complaint of Appellants of June 14, 1984.)

In the Affidavit of Saundra Brower, filed together with the Motion for Partial Summary Judgement of the Appellant and dated Sep. 1 1984, Plaintiff stated therein she did not discover the negligence of the Respondents until July of 1981 when she was required to go to the Kanab Hospital in Kanab Utah under the care of Dr. Pandya. (See Affidavit of Saundra

of Saundra Brower dated Sep 1, 1981.)

The order denying Plainiffs' Motion for Partial Summary Judgment as against both Respondents was entered Mar. 11, 1985 and was certified for appeal pursuant to rule 54 (b) Utah Rules of Civil Proceedure. The orders granting the motions of the Respondents were final.

SUMMARY OF ARGUMENTS

POINT I.

The Appellants were not advised of the misconduct and/or negligence of the Respondents until July of 1981, when Appellant Saundra Brower sought emergency medical treatment for problems proximately flowing from such negligence, at which time a physician advised her of Respondents' misconduct. The exception of Foil v Ballinger, 601 P d 144 (Utah 1979) applies. In Foil, the statute of limitations commenced to run when the Plaintiff was advised of the misconduct by a medical panel more than two years following the actual injury. Likewise, Appellants were so advised approximately 9 months thereafter, but filed their action within two years thereafter.

POINT II

Since genuine issues of fact exist as to the date when Appellants knew or should have known of the negligence of Respondents, the court, considering all the evidence, and giving all reasonable inferences to Appellants, should have denied Respondents Motions for Summary Judgment.

POINT III

Appellants had no knowledge of Respondents' negligence until July of 1981, which was within two years of the date of service of the notice of intent and filing suit. The negligent injection or puncture wound was done while Appellant Saundra Brower was under anesthetec. Respondents supressed any evidence of wrongdoing. Respondent Brown did not tell Appellants there was anything unusual about her problems following thesurgery. No evidence exists showing Appellants knew of Respondent's misconduct at the time of the injuries, other than that Appellant Saundra Brower's leg hurt in the hospital.

ARGUMENT

POINT I.

THE DATE OF RUNNING OF THE TWO YEAR STATUTE COMMENCED RUNNING UPON DISCOVERY OF RESPONDENTS' MISCONDUCT BY APPELLANTS IN JULY OF 1981, NOT IN OCTOBER OF 1980 WHICH WAS THE DATE OF THE INJURY.

Respondents have contended in their memorandums on file herein in support of their Motions for Summary Judgment that the Appellants discovered and were aware of the negligence of the Respondents in October of 1980, when the injury occurred at Respondents' Hospital and when the hysterectomy was performed and the advice given to the Appellant thereby by Respondent Brown. (See Memorandums of Points and Authorities in support of Respondents Motions for Summary Judgment dated Aug.3 and 10, 1985.)

This case is similiar to the case of Foil v Ballinger, 601 P. 2d 144 (Utah 1979). The Plaintiff sustained a back injury, in May of 1967, being an industrial injury, and subsequently received a permanant subarachnoid phenol block on Jan. 18, 1974. The injuries complained of arose out of the "block".

The Plaintiff in Foil continued to sustain further problems following the "block" relating to her bladder and her rectum, and underwent a total colectomy and ileoproctostomy in December of 1975. On Jun. 23, 1977, the Utah State Industrial Commission issued a written report indicating that both the rectal and bladder problems of the Plaintiff had been caused primarily by "the block" administered Jan 18, 1974. The court held that the two year statute began running as of the date the Plantiff was advised by the written report of the State Industrial Commission dated Jun. 23, 1977, not the date of the injury, which was in 1974. The court further held that the cause of action of the Plaintiff was not barred therein. On Mar. 17, 1978, more than four years after the administration of the "block", a Notice of Intent was served for the first time on the Defendant in that action, and then on Jun.26, 1978, an action was filed against the Defendant.

The instant case is comparable to Foil (supra), in that although Appellant Saundra Brower, sustained the injury in

October of 1980, she did not become aware until July of 1981 that injuries were caused due to the negligence or conduct of the Respondents. This was at the time that Appellant Saundra Brower was compelled to receive emergency treatment at the Kanab Hospital in July of 1981, and from Dr. Pandya. (Deposition of Saundra Brower pages 66-69.)

The Court in Foil (supra) a p. 148, cited Christianson v Reese, 20 Utah 2d 199, 436 P 2d 435 (1968) stating that if the patient was ignorant of "his right of action for malpractice," the cause of action accrued at the date "he" learned of the foreign object in his body.

In Foil, the Court stated at page 147, (supra):

> "But when injuries are suffered that have been caused by an unknown act of negligence by an expert, the law ought not to be construed to destroy the right of action before a person even becomes aware of the existence of that right..."
>
> Further, on page 148, (id.) the court said: "This court held, overrulling a previous case, that if the patient was ignorant of "his" right of action for malpractice," the cause of action did not accrue at the date of the alleged negligence, but rather at the date he learned of the foreign object in his body..."
>
> The Court further continues and says at page 148, (supra) "In the instant case the Plaintiff alleges she did not know of her right of action for

malpractice until she was apprised of the cause of her injuries by the medical panel report. We see no basis formaking a legal distinction between having no knowledge of an injury, as was the case in Christiansen, and no knowledge that a known injury was caused by unknown negligence. Accordingly, we hold that the term discovery of "injury" in Section 78-14-4 means discovery of injury and the negligence which results in the injury."

Appellant had no way of knowing or discovering the negligence of the Respondents at the time the act ocurred. There was supression of communication of the knowledge of that negligence, not only by the charge nurse of the Respondent Hospital, but also by Dr. Brown. (Deposition of Saundra Brower pages 51,52). (Deposition of Condra Lawrence, pages 9,10; 12 line 24 to page 13 line 2)

The acquisition of the knowledge of the misconduct of Respondents was precipated by the problems resulting from Respondents' negligence requiring her to go to the emergency hospital in July of 1981 where she acquired such knowledge. (Deposition of Saundra Brower pages 66-67).

When the Notice of Intent was filed herein, on Feb 16, 1983, it was within two years of the date of discovery of the negligence of Respondents, as was the filing of Appellants' complaint in June, 1983.

Point II

THE DISTRICT COURT IMPROPERLY GRANTED THE RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT IN THAT GENUINE ISSUES OF MATERIAL FACT WERE RAISED BY APPELLANT.

It is well settled that if genuine issues of material fact are raised, a motion for summary judgment should be denied. (Am.Jur. 2d Limitation of Actions, sec. 470, and 61 ALR 2d 341.)

Under Utah code, Ann., (1953, as amended), sec 78-12-47, the issue of the Statute of Limitations, when demanded by a party, may be tried separately before any issues in the case are tried. The Respondent Dr. Brown filed a Motion for a separate trial of the statute of limitations issue, Jun. 1, 1984, which is on file. Apellants' Motion for a Partial Summary Judgment on the issue of such a separate trial was denied by the District Court Mar.11, 1985. (Order Denying Plaintiffs' Motion for Partial Summary Judgment.) Respondents' motions for summary judgment should have been denied out of hand because of the existence of genuine issues of material fact, as follows:

A. Whether Appellants saw any apparent connection between the treatment provided by the health care providers (Respondents) and the injury suffered.

B. Whether the Plaintiff knew or should have known of the misconduct of Respondents at the time of the injury (ies).

C. Whether the injury was catastrophic.

D. Whether Appellants' first knowledge of the misconduct of Respondents was in July of 1981.

E. Whether Respondents suppressed evidence of their misconduct.

F. What was the date of discovery of Respondents' misconduct? The record is devoid of any evidence conrtadicting Appellant's learning of the misconduct of Respondents in July of 1981.

The Utah rule is clearly stated in Bushnell Real Estate, Inc. v Nielson, 672 P. 2d 746, 749 (Utah, 1983)

> This Court has often stated the standard of review for summary judgments. In reviewing a summary judgment, we must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment to determine whether there is a material issue of fact to be tried. The movant is entitled to summary judgment only if he is "entitled to a judgment as a matter of law" on the undisputed facts. Utah R.Civ P 56 (c).
>
> Horgan v Industrial Design Corp., Utah, 657 P2d 751, 752, (1982) (citations omitted). In a recent case, we emphasized that "(s)ummary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no

genuine issue of material fact and that the party is entitled to judgment as a matter of law." Lockhart Co. v Equitable Reality Co., Utah, 657 P 2d 1333,1335 (1983) (Quoting Bowen v Riverton City, Utah, 656 P 2d 434 (1982)"

This policy is reflected in Maughan v S.W. servicing, Inc. 758 F. 2d 1381 (1985), reversing a Utah United States District Court decision.

Point III.

THERE IS NOT SUFFICIENT EVIDENCE TO SHOW THAT APPELLANTS KNEW OR SHOULD HAVE KNOWN UNTIL JULY, 1981 THAT THE ACTUAL INJURIES APPELLANT SAUNDRA BROWER SUFFERED MAY HAVE BEEN CAUSED BY NEGLIGENCE ON THE PART OF THE RESPONDENTS.

Foil (supra page 147) states that Foil sought to protect only "the untutored average layman [who sees] no apparent connection between the treatment provided by the physician and the injury suffered." (brackets ours). The following evidence indicates Appellants could not have become aware of any misconduct until July 1981:

A. Appellant, Saundra Brower testified that Dr. Brown stated to her immediately prior to the surgery, on or about Oct 14, 1980: "He said it would clear up the endometriosis, and that the pain would be gone, and that he would guarantee that I was going to feel better than I had in my whole life." (Deposition of Saundra Brower, page 41, lines 11-14, page 42, lines 4-12)

B. Dr. Brown, approximately one month following the surgery in 1980, after checking Appellant Saundra Brower, told her that about all he could do was to give her one shot and some hormone cream. He told said Appellant that was all he could "really do for me." (Deposition of Saundra Brower page 61, line 9-20,25, page 62, line 1.) She was then advised by Dr. Brown that she could not take a hormone. (Deposition of Saundra Brower, page 66 lines 1-10.)

C. As to the puncture or injection wound to the right thigh of Appellant Saundra Brower, while under anesthetic, she did inquire about it. She was told Dr. Brown was looking into it and that the nurse thought she had received a "K" shot. No further mention was made of it, and Appellant Brower thought, "That has happened, and figured, well, It's going to go away." Dr. Brown did not say anything about the leg to said Appellant again. (Deposition of Saundra Brower, pages 51-53, lines 14, 15, 20, 21)†

It is obvious that Appellant did not have sufficient facts before her to suspect that her resulting injuries, which surfaced in an emergency situation almost a year later requiring her to go to the Kanab hospital, were caused by negligence, until she was so advised in July, of 1981.

A Utah Bar journal article entitled "An Update on Utah's Medical Malpractice Discovery Rule" volume 12, Fall-Winter 1984, page 63, discusses Reiser v Lohner, 641 P 2d 93, (Utah 1982) and Hove v McMaster, 621 P 2d 694 (Utah, 1980). In both of those cases, the Court ruled or upheld the Defendant.

However, there is an important distinction in that in Reiser, the Plaintiff sustained a catastrophic injury during a routine treatment which resulted in cardiac arrest. That was not the case in the instant matter. The injuries sustained were not catastrophic, and were of a nature that, coupled with supression, would not have put the untutored layman on notice of anything except usual recovery symptoms.

In Hove, the Plaintiff had consulted a neurologist within a year after the purported injury, who suggested that her complaint "might represent some complication of her prior dental injections and/or her dental surgery." (Hove v McMasters, supra, page 696.)

Hove is distinguishable, because the Plaintiff waited more than two years from the date of the neurological analysis to file her complaint. That is not the case here. The Appellants filed their notice and complaint within the two years following the date of the analysis of their problems by another physician precipitated by Appellant Saundra Brower's going to another hospital in July of 1981 where the negligence was discovered.

In the instant case, there was (1) no obviousness of the connection between the treatment and the injury; (2) there was a distinct possibility that the injury might be mistaken as an unavoidable consequence of the medical treatment; (3) no medical diagnosis suggesting that the injury was caused by negligence was provided Appellants until July of 1981 when

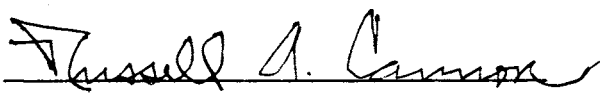
Appellant Saundra Brower was forced to go to the hospital for complications flowing from the misconduct of Respondents. The notice of intent was filed well within two years from that date; (4) the patient had no subjective understanding of the field of medicine; (5) this was not a catastrophic type of injury; and (6) Appellant Saundra Brower relied on Respondent Brown's direct supervision over her and on his guarantees that she would have no further problems, and by reason of the fact that Respondent Dr. Brown, being advised of the injury to her leg, did not make any further comment or advice to her on it. Therefore she was misled, thinking it was merely a routine situation following her type of surgery and hospitilization. (See An Update on Utah's Medical Malpractice Discovery rule, supra p. 54)

CONCLUSION

Wherefore, It is respectfully submitted that the judgment and order granting the Motions for Summary Judgments of the Respondents be reversed; that the judgment denying Appellants' Motion for Partial Summary Judgment be reversed; and that Appellants, accordingly, should be allowed their day in court.

Respectfully submitted,

CANNON & WILKINSON



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IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

SAUNDRA BROWER and FRANK OSCAR BROWER, Plaintiffs, -vs- DR. DAVID W. BROWN and I.H.C. HOSPITALS, INC., a corporation, and I.H.C. HOSPITALS, INC., a corporation doing business as VALLEY VIEW MEDICAL CENTER, Defendants.	O R D E R Civil No. 10202

The Motion for Summary Judgment of Defendant I.H.C. HOSPITALS, INC., a corporation, and I.H.C. HOSPITALS, INC., a corporation doing business as VALLEY VIEW MEDICAL CENTER (hereinafter referred to as "Hospital"), having come on for argument before the Honorable Allen B. Sorensen, the hospital being represented by Charles W. Dahlquist, II, Defendant Dr. David W. Brown being represented by Jody K. Burnett, and Plaintiffs being represented by Russell A.

Cannon, the Court having heard full argument on the matter and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant Hospital's Motion for Summary Judgment is hereby granted; Plaintiff's Motion for Partial Summary Judgment having been fully considered by and argued before the Court is hereby denied; and Plaintiffs' action against Defendant Hospital is hereby dismissed with prejudice, each party to bear their own costs.

DATED this 21 day of Feb, 1985.

BY THE COURT:

Allen B. Sorensen

ALLEN B. SORENSEN, District Judge Ret.

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IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

SAUNDRA BROWER and
FRANK OSCAR BROWER,

Plaintiff,

vs.

DR. DAVID W. BROWN, and
I.H.C. HOSPITALS, INC.,
a corporation, and I.H.C.
HOSPITALS, INC., a
corporation doing business
as VALLEY VIEW MEDICAL CENTER,

Defendants.

SUMMARY JUDGMENT

Civil No. 10201

The Motion for Summary Judgment of defendant Dr. David W. Brown, having come on regularly for hearing on Wednesday, December 19, 1984, before the above-entitled Court, and Russell A. Cannon appearing for the plaintiff, Charles W. Dahlquist, II, appearing for defendant I.H.C. Hospitals, Inc. dba Valley View Medical Center, and Jody K. Burnett appearing for defendant Dr. David W. Brown; and the Court having reviewed the pleadings, memoranda, and depositions on file herein, and having heard the arguments of counsel, and the Court being fully advised in the premises, and good cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff's complaint as against Defendant Dr. David W. Brown be and the same is hereby dismissed with prejudice and upon the merits, and judgment is hereby entered in favor of defendant Brown and against the plaintiffs, no cause of action.

DATED this 4 day of Jan., 1985.

BY THE COURT:

Allen B. Sorensen

Allen B. Sorensen, Senior District Court Judge

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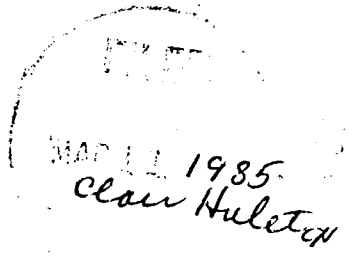

IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

SAUNDRA BROWER and FRANK OSCAR BROWER, Plaintiffs, vs. DR DAVID W. BROWN, et al., Defendants.	JUDGMENT DENYING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT CASE NO. 10202

The motions for partial summary judgment of plaintiffs as against each of the Defendants respectively, having come on regularly for hearing December 19, 1984, before the above entitled court, Russell A. Cannon appearing for Plaintiffs, Charles Dahlquist appearing for Defendant I.H.C. Hospitals, Inc. dba Valley View Medical Center, and Jody K. Burnett appearing for Defendant Dr. David W. Brown; and the court having reviewed the pleadings and memoranda on file herein, and having heard the

arguments of counsel, and the court being fully advised in the premises, good cause appearing therefore, and this court finding and determining there is no just cause for delay of the appeal, it is hereby

ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Motion for Partial Summary Judgment as against Defendant Dr. David W. Brown, is denied; that Plaintiffs' Motion for Partial Summary Judgment against Defendant I.H.C. Hospitals, Inc., a corporation, dba Valley View Medical Center, is hereby denied. There is no just cause for delay of this appeal as to both of said Orders and Judgments denying Plaintiffs' respective Motions for Partial Summary Judgment, and it is hereby ordered that the same and each of them be entered as final judgments. Each party shall bear its own costs.

Dated this 21 day of [illegible], 1985

BY THE COURT

Allen B. Sorensen

ALLEN B. SORENSEN
District Judge, Retired

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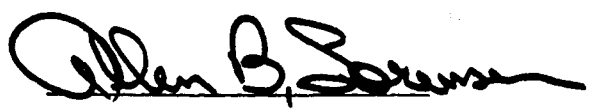
IN THE FIFTH JUDICIAL DISTRICT COURT FOR IRON COUNTY

STATE OF UTAH

SAUNDRA BROWER and FRANK OSCAR BROWER,	CIVIL NO. 10201
Plaintiffs,	ORDER PUBLISHING DEPOSITIONS
vs.	
DR. DAVID W. BROWN, et al.,	
Defendants.	

Pursuant to the stipulation of the parties in open court of the above entitled matter on December 19, 1984, it is hereby ordered that all of the depositions in this matter, to wit: SAUNDRA BROWER, OSCAR F. BROWER, DR. DAVID W. BROWN, CONDRA LAWRENCE, DOYLE T. CANTRELL, VIRGINIA E. WYATT are hereby ordered published.

DATED: January 18, 1985



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IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

SAUNDRA BROWER and
FRANK OSCAR BROWER,

Plaintiffs,

vs.

DR. DAVID W. BROWN,
and
I. H. C. HOSPITALS INC.,
a corporation, and
I. H. C. HOSPITALS, INC.,
a corporation doing
business as VALLEY VIEW
MEDICAL CENTER,

Defendants.

AFFADAVIT OF
SAUNDRA BROWER, Plaintiff

Civil No. 10201

STATE OF UTAH :
COUNTY OF WASHINGTON: ss

The Plaintiff, SAUNDRA BROWER, who being first duly sworn deposes says:

1. That she is the Plaintiff in this matter.

2. That she did not discover that Dr. Brown had been negligent until July of 1981, when she was required to go

for emergency treatment and hospitalization for her right thigh and groin area to the Kanab Hospital in Kanab, Utah under the care of Dr. Pandya. That at that time she became aware that her problems resulted from the treatment and/or surgery of Dr. Brown.

3. That she did not discover until July of 1981 as a result of the above referred to hospitalization, and treatment that the injury to her right thigh, sustained while under the exclusive care and control of Valley View Medical Center, while under an anesthetic, had resulted in a continuing injury to her. She did not discover until that time that the injury to her right thigh was due to the negligence of both defendants.

4. The undersigned was not told that the puncture injury to her right thigh was negligent or improper, or treated improperly, by any of the defendants or their representatives, nor was she told by Dr. Brown at any time that his treatment was improper or negligent.

5. That she had no way of knowing that she sustained a legal injury or that there had been any negligence in connection with this operation or the injury sustained in the hospital, prior to July, 1981, when Dr. Bever and Dr. Pandya indicated otherwise, nor could she with reasonable diligence, based on

the circumstances, have discovered such negligence prior thereto.

DATED: September 1 , 1984 at St. George, Utah.

_____
SAUNDRA BROWER

Subscribed and Sworn to
before me Notary Public.

_____
Notary Public
My Commission Expires:

78-14-4. Statute of limitations — Exceptions — Application. (1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence, except that:

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs; and

(b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under section 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law; but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

78-14-8. Notice of intent to commence action. No malpractice action against a health care provider may be initiated unless and until the plaintiff gives the prospective defendant or his executor or successor, at least ninety days' prior notice of intent to commence an action. Such notice shall include a general statement of the nature of the claim, the persons involved, the date, time and place of the occurrence, the circumstances thereof, specific allegations of misconduct on the part of the prospective defendant, the nature of the alleged injuries and other damages sustained. Notice may be in letter or affidavit form executed by the plaintiff or his attorney. Service shall be accomplished by persons authorized and in the manner prescribed by the Utah Rules of Civil Procedure for the service of the summons and complaint in a civil action or by certified mail, return receipt requested, in which case notice shall be deemed to have been served on the date of mailing. Such notice shall be served within the time allowed for commencing a malpractice action against a health care provider. If the notice is served less than ninety days prior to the expiration of the applicable time period, the time for commencing the malpractice action against the health care provider shall be extended to 120 days from the date of service of notice.

This section shall, for purposes of determining its retroactivity, not be construed as relating to the limitation on the time for commencing any action, and shall apply only to causes of action arising on or after April 1, 1976. This section shall not apply to third party actions, counterclaims or crossclaims against a health care provider.

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing APPELLANTS' OPENING BRIEF were sent by first class mail with postage prepaid thereon this 12 day august, 1985 to:

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